2726

SUPREME COURT OF THE UNITED STATES.

No. 262.

THE UNITED STATES, APP'TS,

vs.

JAMES NOE.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN [DISTRICT] OF CALIFORNIA.

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OFFICE OF THE BOARD OF COMMISSIONERS TO ASCERTAIN AND SETTLE THE PRIVATE LAND CLAIMS IN THE STATE OF CALIFORNIA.

Be it remembered, that on this 24th day of July, anno Domini one thousand eight hundred and fifty-two, before the commissioners to ascertain and settle the private land claims in the State of California, sitting as a board in the city of San Francisco, in the State aforesaid, in the United States of America, the following proceedings were had, to wit:

The petition of "James Noe," for the place named "Island of Sacramento," was presented, and ordered to be filed and docketed with No. 294, and is as follows, to wit:

(Vide page 5 of this transcript.)

Upon which petition the following subsequent proceedings were had in their chronological order, to wit:

SAN FRANCISCO, *August* 3*d*, 1852.

In case No. 294, James Noe, for the Island of Sacramento, on motion of the claimant, leave was granted to withdraw the original transfer, marked Exhibit C, for the purpose of having the same recorded in the county where the land is situated.

SAN FRANCISCO, *August* 14*th*, 1852.

In the same case, the counsel for the claimant, R. Rose, filed the original transfer, marked Exhibit C, after having been recorded in the county of Colusé.

SAN FRANCISCO, *December* 16, 1852.

In the same case, the deposition of Robert Elwell, a witness in behalf of the claimant, taken before Commissioner Harry J. Thornton, was filed.

(Vide page 6 of this transcript.)

SAN FRANCISCO, *January* 27*th*, 1853.

In the same case, the deposition of Juan B. Alvarado, a witness in behalf of the claimant, taken before Commissioner Harry J. Thornton, with documents marked H. J. T. A. annexed thereto, was filed.

(Vide page 8 of this transcript.)

SAN FRANCISCO, *February* 15, 1853.

In the same case, the deposition of José Castro, a witness in behalf of the claimant, taken before Commissioner Harry J. Thornton, was filed.

(Vide page 10 of this transcript.

SAN FRANCISCO, *February* 19, 1853.

In the same case, the deposition of Abner Phelps, a witness in behalf of the claimant, taken before Commissioner Hiland Hall, was filed.

(Vide page 9 of this transcript.)

SAN FRANCISCO, *October* 3*d*, 1853.

Case No. 294 was ordered to the foot of the calendar.

SAN FRANCISCO, *October* 3*d*, 1854.

Case No. 294 was, on motion of the counsel for the claimant, with the consent of the U. S. law agent, ordered to be placed at the foot of the 2d class cases on the trial docket.

SAN FRANCISCO, *November* 14, 1854.

Case No. 294 was, on motion of the counsel for the claimant, with the consent of the U. S. law agent, ordered to be placed at the foot of the 3d class cases on the trial docket.

SAN FRANCISCO, *December* 19, 1854.

In the same case, the counsel for the claimant filed the following affidavit, to wit:

(Vide page 19 of this transcript.)

And the prayer of the petitioner therein having been granted, the case was continued, and ordered to be placed at the foot of the 4th class cases on the trial docket.

SAN FRANCISCO, *January* 30, 1855.

Case No. 294 was submitted under the rule of March 21st, 1854.

SAN FRANCISCO, *February* 6, 1855.

In the same case, Commissioner Alpheus Felch delivered the opinion of the board rejecting the same.

(Vide page 21 of this transcript.)

And the following order was made, to wit:

(Vide page 24 of this transcript.)

Petition.

To the board of commissioners for ascertaining and settling private land claims in the State of California.

Your petitioner, James Noe, of Yolo county, in the State of California, respectfully represents to your honorable board, that he claims a certain tract of land called Island of Sacramento, contain-

ing five sitios, more or less, situated in the county of Yolo, in said State of California; that he claims the same, in fee, by virtue of a grant made to Robert Elwell, under the authority of the Mexican government, by Juan B. Alvarado, governor of California, bearing date 15th of March, 1841.

Your petitioner further represents, that the said grantee, on the 23d day of July, 1852, transferred his right in said land to your petitioner, as evidenced in the deed of conveyance executed by the said R. Elwell, before A. Phelps, a notary public in this city, and hereunto annexed, marked Exhibit B.

Your petitioner presents herewith the original grant of said land in the Spanish language, marked "A," together with a translation of the same, also the original map of the said land, and will make further proof of title if required by the board.

Your petitioner prays your honorable board to take into consideration his claim to said tract of land, and decree his title to be valid, and confirm the same.

And your petitioner will ever pray.

JAMES NOE.

Filed in office July 24th, 1852.

(Signed) GEO. FISHER, *Sec'y.*

Deposition of Robert Elwell.

SAN FRANCISCO, *December 16th*, 1852.

On this day, before Harry J. Thornton, commissioner, came Robert Elwell, a witness in behalf of the claimant, James Noe, petition No. 294, and was duly sworn; his evidence being given in English.

The U. S. associate law agent was present.

Questions by claimant.

Question 1st. What is your name, age, and place of residence?

Answer. My name is Robert Elwell, my age 54 years, and my residence has been for thirty years and is now in California.

Quest. 2. Were you the original grantee of the land claimed by James Noe in this case? and if so, state whether you are interested in the decision of the claim in any manner.

Ans. I am the person to whom the land was given, and have abandoned, for valuable consideration, all claim or interest in it to Mr. Noe, without any recourse in any event, and have no interest in its decision.

Question. Did you or not ever furnish a map or design of the land claimed?

Ans. I did furnish a sketch, which was supposed sufficient, as the place asked for was an island, about three months after the presentation of the petition.

Cross-questions by the law agent of the U. S.

Cross-ques. 1. Was any information or report made to the governor by any alcalde or other person in this case?

Answer. There was no officer there at the time to refer to. It was in the midst of , and no formal report ever was made. The governor himself was made acquainted by me with the place, and had himself, as he said, a knowledge of the place.

Quest. 2. Did you ever receive a title to this land? and if so, where is it?

Ans. I did, according to Spanish mode of giving it, and that title was transferred by me to the claimant, and is on file in this case.

Question 3. Did you ever receive judicial possession of the land?

Ans. I never did.

Quest. 4. Did you ever occupy the land?

Ans. I never did.

Examination continued by claimant.

1st. Why did you not occupy the land?

Ans. I did not occupy it at the time of the grant because of the danger from the Indians, and afterwards the disturbances in the country prevented it.

Further cross-examination by law agent.

Ques. 1. Did not other people settle on land in that section of the country since the time of your grant?

Ans. Yes; particularly since the discovery of gold mines.

ROBERT ELWELL.

U. S. law agent present.

Sworn to and subscribed before me this 16th of Dec'r, 1852.

H. J. THORNTON,
Commissioner, &c.

Filed in office Dece'r 16th, 1852.

(Signed) GEO. FISHER, *Sec'y.*

Deposition of Juan B. Alvarado.

SAN FRANCISCO, *January* 27, 1853.

On this day, before Commissioner Harry J. Thornton, came Juan B. Alvarado, a witness in behalf of the claimant, James Noe, petition No. 294, and was duly sworn; his evidence being interpreted by the secretary.

The U. S. associate law agent was present.

Deposition of Gov. Juan B. Alvarado in claim No. 294.

Witness states that the document now here shown him, marked

A, filed with the petition of James Noe in the secretary's office of the board of land commissioners, is an original document, and that it was signed by him at the time it purports to be signed, when he was governor of the department of the Californias, and that it was granted in consideration of many and valuable services rendered the government by the grantee therein named.

JUAN B. ALVARADO.

Service admitted.

R. GREENHOW,
Ass't U. S. Law Agent.

Sworn to and subscribed before me this 27th of January, 1853.

HARRY J. THORNTON,
Commissioner, &c.

Filed in office January 27th, 1853.

(Signed) GEO. FISHER, *Sec'y.*

Deposition of Abner Phelps.

SAN FRANCISCO, *February* 19, 1853.

On this day, before Commissioner Hiland Hall, came Abner Phelps, a witness in behalf of the claimant, James Noe, petition No. 294, and was duly sworn; his evidence being given in English. The U. S. asso. law agent was present.

Deposition of Abner Phelps in claim No. 294.

Witness states that his name is Abner Phelps, his age is 21 years and upwards, and place of residence San Francisco; that he knows the island in the Sacramento river, about fifty miles above the city of Sacramento, now claimed by James Noe; that he was on said island some time in June or July, 1851, and saw said Noe there, who pointed out to him a person by the name of Champlain, as well as he recollects, and said that he was residing there, holding possession of said land for him as his tenant; that he also saw a small house on it, and a quantity of hay cut and in possession of said Champlain. Witness also says that he saw several other persons there with whom I had no communication.

A. PHELPS.

Sworn and subscribed before me.

HILAND HALL, *Commissioner.*

Filed in office February 19th, 1853.

(Signed) GEO. FISHER, *Sec'y.*

Deposition of José Castro.

On this day, before Commissioner Harry J. Thornton, came José

port of Monterey, in the department of the Californias, for the years eighteen hundred and forty and eighteen hundred and forty-one.

XIMENO.

MONTEREY, *March 15th*, 1841.

Agreeably to what the petitioner asks, and in consideration of the services and merits herein mentioned, I grant him the land he requests, with the understanding that he shall abide by the reports that must be asked for, as to whether the land has been granted for the benefit of some private individual, pueblo, or corporation, with all the rest that may be deemed convenient, so soon as he shall accompany the plat, which will head the formation of the espediente, (proceedings.)

Thus did I, Juan B. Alvarado, governor of the Californias, command and sign.

ALVARADO.

ANTONIO MARIA OSIO.

TO HIS EXCELLENCY THE GOVERNOR: Roberto Elwell, a citizen of this department of Upper California, before your excellency respectfully represents, that I have been a resident of this country for sixteen years, married one of the natives, and have a numerous family, having employed all my time in commercial affairs; but the *remains* changes in the political circumstances which have happened in this republic, have caused a detriment to my capital, part of which was furnished to the different governors of California, as your exc'y is aware, insomuch that I was obliged to enlist as a private soldier in the national militia, which service I fulfilled with honor, under the orders of your excellency, who commanded in chief the expedition to the south, in the year 1838, without exacting for my services a single dollar, by reason of the scarcity of funds in the national exchequer; but now that your ex'cy, after having employed your efforts in the general pacification of the inhabitants, is at the head of government, and not forgetful how to generously recompense those who were your faithful subordinates, not only acting in this as a principal, but in view of the necessity to give impulse to the progress of agriculture in this country, supported, as your ex'cy is, by the laws of colonization, which so fully authorizes your ex'cy to make concessions of land, I would, for these reasons, request your excellency to grant me a parcel of land situated in the waste part of the northern frontier of Sacramento, distant about 18 leagues from the establishment of Don Aug. Sutter.

This land is bounded by the river Sacramento like an island, and is indicated by a hill on the bank of the river, which now divides itself into two arms, east and west; said land containing five sitios de ganado mayor, (square leagues,) more or less, agreeably to the

plat which I shall present as soon as circumstances shall permit me so to do.

Wherefore I ask and beseech your excellency to be pleased [to] decree favorably to my petition, in which I shall receive a favor.

ROBERT ELWELL.

Monterey, March 10th, 1841.

I certify the foregoing to be a true and correct translation from the original Spanish on file in this office in case No. 294, James Noe. Office of the U. S. land commissioner in California, San Francisco, July 24, 1852.

GEO. FISHER, *Sec'y.*

Filed in office July 24th, 1852.

(Signed) GEO. FISHER, *Sec'y.*

B. *Original Deed from Elwell to Noe.*

This indenture, made the twenty-third day of July, in the year one thousand eight hundred and fifty-two, between Robert Elwell, of the county and city of San Francisco, in the State of California, on the first part, and James Noe, of the county of Yolo, in the State of California, of the second part, witnesseth, that the said party of the first part, in consideration of the sum of three thousand five hundred and fifty dollars, to me duly paid before the delivery hereof, has bargained and sold, and by these presents do grant and convey, to the said party of the second part, his heirs and assigns forever, all and singular, all my right, title, interest, and claim to that certain tract of land granted to me by Juan B. Alvarado, late governor of Upper California, by grant bearing date at Monterey, the 15th day of March, 1841, containing five sitios, more or less, described in said grant and accompanying plat as an island made by the Sacramento river, about eighteen leagues above John A. Sutter fort, commencing at the island opposite a mound, meandering up what is now called the slough to its intersection with the river Sacramento, thence down the river Sacramento, *river* meandering the said river to the place of beginning, for more particular description of which reference is made to the grant and plat above mentioned—

With the appurtenances, and all the estate, title, and interest of the said party of the first part therein. And the said party of the first part does hereby covenant and agree with the said party of the second part, that at the time of the delivery hereof the said party of the first part is the lawful owner of the premises above granted, and seized thereof in fee simple absolute, and that he will warrant and defend the above-granted premises in the quiet and peaceable possession of the said party of the second part, his heirs and assigns forever.

In witness whereof, the said party of the first part has hereunto set his hand and seal the day and year first above written.

ROBERT ELWELL, [L. S.]

Sealed and delivered in the presence of—

STATE OF CALIFORNIA,
County of San Francisco, ss:

On this twenty-third day of July, in the year of our Lord one thousand eight hundred and fifty-two, before me, came Robert Elwell, to me known to be the individual described in and who executed the within instrument, and acknowledges that he executed the same of his own free act and deed, and for the purposes therein mentioned.

[L. S.] In witness whereof, I have hereunto set my hand, and affixed my official seal, the day and year first above written.

A. PHELPS, *Notary Public.*

Original filed in office July 31, 1852.

(Signed) GEO. FISHER, *Sec'y.*

Affidavit of James Noe.

JAMES NOE
vs.
UNITED STATES. } Board of Land Commissioners, Case No. 294.

I, James Noe, claimant in the above-entitled cause, of lawful age, depose and say, that Nathan Coombs, of Napa, in this State, is an important witness, whose testimony, I am advised by my counsel, is important to be taken and used on trial.

The said Coombs is an active business man engaged in staging. He has been in California, and knows well the island claimed by this affiant in the above cause.

Your affiant has once procured the attendance of the said Coombs here before the commission to give his testimony, but the engagement of the commissioner and the law agent at that time prevented his testimony being taken.

Mr. Coombs promised your affiant that he would be in the city shortly after, and give testimony; and your affiant confidently expects him so to do very shortly.

Your affiant is advised that he cannot safely submit his cause without said testimony, and therefore prays your honorable board to place said cause No. 294 at the foot of the fourth class of cases on your hon'l docket.

JAMES NOE.

San Francisco, December 19th, 1854.

Subscribed and sworn before me on this 19th day of December, A. D. 1854.

PETER LOTT, *Commissioner.*

Filed in office Dece'r 11th, 1854.

(Signed) GEO. FISHER, *Sec'y.*

Opinion by Commissioner Felch.

JAMES NOE
vs.
THE UNITED STATES.

For the place called the Island of Sacramento, in Yolo county, containing five square leagues of land.

The land claimed in this case is situated on the Sacramento river, and receives the designation of an island, from the circumstance of its being separated from the main land by a slough making out from the river above and forming it again below the premises.

The claimant has given in evidence a deed of the premises made to him by Robert Elwell, dated July 23, 1852. The proof relied on to establish a grant to Elwell consists of his petition to the governor for a grant, dated March 10th, 1841, and a marginal decree by Governor Alvarado of the 15th of the same month.

The decree concedes the land, but under the condition that the grantee should abide by the reports that must be asked for, as to whether the land has been granted for the benefit of some private individual, pueblo, or corporation, with all the rest that may be deemed convenient, so soon as he shall accompany the plat which will head the formation of the espediente.

The map, it appears from the deposition of Elwell, was furnished, but the information which was contemplated by this decree, and which implied a further action and decision by the governor, upon official reports of the proper officer, in the usual method of proceedings in such cases, appears never to have been obtained, and no proof on the subject is presented to the commission.

The petition for the grant, and also the marginal decree by the governor, refer to the meritorious services of Elwell, as a reason or consideration for making the concession. It is evident, however, from the terms of the petition, that the grant was sought under the colonization laws and regulations, and with a view to agricultural purposes.

Lands were distributed, not sold, under these laws; and by the eighth article of the colonization law of August 18, 1824, and the third and fourth articles of the regulations of November 21, 1828, preference was to be given to persons of private merit, and those who had rendered service to their country. Such services present a good reason for the exercise of the discretion of the governor in a petitioner's favor, and is a proper subject to be brought to his attention, and, all other things being equal, might well influence the mind of the governor to a favorable consideration of his petition; but it is not contemplated in the law or the regulations as dispensing with the conditions of inhabitancy or cultivation imposed

on a grantee. Where a grant is made under these, the conditions attach, of course, whether specified in the grant or not. They are imposed by the law under which it is issued, and which is in legal effect a part of the contract.

On an examination of the documents in this case, it is the opinion of the commission that the concession (if otherwise valid) is a colonization grant, and subject to the conditions above-mentioned.

These terms were never complied with by the grantee. More than two years ago elapsed between the decree of concession and the sale to the present claimant, during which time the grantee never lived upon or cultivated or in any manner occupied or used the premises.

He had, therefore, no title which he could transfer to another, and his deed gave no right to Noe, the present claimant, to the land. An adverse decree must therefore be entered in the case.

(Rejected.)

Filed in office Feb'y 6, 1855.

(Signed) GEO. FISHER, *Sec'y.*

Decree.

JAMES NOE
vs.
THE UNITED STATES.

In this case, on hearing the proofs and allegations, it is adjudged by the commission that the claim of the said petitioner is not valid, and it is therefore decreed that his application for a confirmation thereof be denied.

ALPHEUS FELCH,
R. AUG. THOMPSON,
J. B. FARWELL,
Commissioners.

Filed in office February 6th, 1855.

(Signed) GEO. FISHER, *Sec'y.*

It appearing to the satisfaction of the board that the land hereby adjudicated is situated in the northern district of California, it is hereby ordered that two transcripts of the proceedings and decision in this case, and of the papers and evidence upon which the same are founded, be made out and duly certified by the secretary, one of which transcripts shall be filed with the clerk of the United States district court for the northern judicial district of California, and the other be transmitted to the Attorney General of the United States.

Secretary's Certificate.

OFFICE OF THE BOARD OF COMMISSIONERS TO ASCERTAIN AND SETTLE THE PRIVATE LAND CLAIMS IN THE STATE OF CALIFORNIA.

I, George Fisher, secretary to the board of commissioners to ascertain and settle the private land claims in the State of California, do hereby certify the foregoing twenty-four pages, numbered 1 to 24, both inclusive, to contain a true, correct, and full transcript of the record of the proceedings and of the decision of the said board, of the documentary evidence, and of the testimony of the witnesses, upon which the same is founded, on file in this office in case No. 294 on the docket of the said board, wherein James Noe is the claimant against the United States for the place known by the name of "Island of Sacramento."

[G. F.] In testimony whereof, I hereunto set my hand, and affixed my private seal, (not having a seal of office,) at San Francisco, California, this tenth day of August, A. D. 1855, and of the independence of the United States of America the eightieth.

GEO. FISHER, *Sec'y.*

Endorsed: Filed August 11th, 1855. John A. Monroe, clerk.

Notice of Appeal.

IN THE DISTRICT COURT OF THE UNITED STATES,
For the Northern District of California.

In the matter of James Noe, claiming the island of Sacramento, it being claim numbered two hundred and ninety-four, before the board of land commissioners:

Notice is hereby given that it is the intention of the claimant in the above case to prosecute the appeal from the decision therein of the board of land commissioners, appointed under the act of Congress of 3d March, 1851, entitled An act to ascertain the private land claims in California.

JAMES NOE, *Claimant.*

To the CLERK of the United States
District Court for said Northern District.

(Endorsed:) Filed 18th April, 1855. John A. Monroe, clerk.

Petition for Review.

JAMES NOE
vs.
THE UNITED STATES. } U. S. district court.

The petition of James Noe, appellant in the above-entitled cause, to the honorable the United States district court for the northern

district of California, for a review of the decision therein of the commissioners to settle the private land claims in the State of California, respectfully states, that said appellant is the claimant in said cause, and that the United States are defendants in the same; that said cause is a claim for a tract of land lying in the northern district of California, and within the jurisdiction of this honorable court, and known as the island of Sacramento, and more particularly referred to and described in a petition filed by said appellant before said commissioners for the confirmation to him of said land, which last-mentioned petition will afford full information to this court in that respect; that after the filing of said petition before said commissioners, and the taking of the depositions of certain witnesses on behalf of said claimant, the said commissioners rejected the said claim, and declared the same invalid.

The said appellant further states, that after the rejection of his claim as aforesaid, which occurred in February, 1855, he took his appeal therefrom, as will fully appear by his notice for that purpose filed with the clerk of this court on the eighteenth day of April, 1855; also that the transcript of the record of said commissioners in said cause was filed with said clerk on the eleventh day of August, 1855.

The said appellant therefore prays the decision of said commissioners in said cause be reviewed and reversed, and the claim to said land confirmed.

CALHOUN BENHAM,
JAMES RICE, JR.,
Atty's for Appellant.

(Endorsed:) Filed August 15th, 1855. John A. Monroe, clerk, by W. H. Chevers, deputy.

Answer.

IN THE DISTRICT COURT OF THE UNITED STATES
For the Northern District of California.

THE UNITED STATES, appellees,
vs.
JAMES NOE.

The United States, by their attorney, deny the validity of the title set out in the petition of the said appellants, and pray that the decision of the board of commissioners be affirmed, and that the said title be decreed to be invalid.

A. GLASSELL,
Ass't U. S. Att'y.

(Endorsed:) Filed January 14th, 1856. John A. Monroe, clerk, by W. H. Chevers, deputy.

Deposition of Nathan Coombs.

UNITED STATES DISTRICT COURT,
Northern District of California.

JAMES NOE
vs.
THE UNITED STATES.

SAN FRANCISCO, *December* 19, 1855.

On this day, before John A. Monroe, a commissioner of the United States for the northern district of California, duly authorized to administer oaths, &c., &c., came Nathan Coombs, a witness produced on behalf of the claimant in case No. 270, being an appeal from the board of commissioners to ascertain and settle the private land claims in the State of California, in case No. 294 on the docket of the said board of commissioners, and was duly sworn, and testified as follows:

Present, Charles B. Strode, counsel for the claimant, and the U. S. district attorney, by A. Glassell, esq.

1st question by claimants. What is your name, age, and place of residence?

Answer. Nathan Coombs, am 30 years of age, reside in Napa county, Cal'a, and have resided in this State since the year 1843.

2d. Are you acquainted with the Sacramento river and its general character and topography?

Answer. I am.

3d. Are you acquainted with the old establishment of Don Augustus Sutter? If yea, please state where it was.

Answer. I am acquainted with said establishment. It was about one mile or 1½ miles northeast of where the city of Sacramento now stands.

4th. Are you acquainted with an island in the Sacramento river to the northward of Sutter's old establishment about 18 leagues? If yea, please describe said island as well as you can, its area.

Answer. I am acquainted with this island. The lower end of this island is about 30 miles by land from Sutter's fort, and perhaps 40 miles by water. There is a mound on the southwest side of the slough on the river, and opposite the lower end of the island. This island is about 20 miles in length from the mound, running up the river. The average width of the island is from 2½ to 3 miles.

5th. Are you acquainted with any other island in the Sacramento river above Sutter fort, in the neighborhood of this island, of anything like equal dimensions?

Answer. There is none other than the one claimed in this case that has anything like the quantity of land in that neighborhood and north of Sutter's fort.

6th. How long have you been acquainted with this island?

Answer. Ever since the year 1843, in the month of June.

7th. What was the condition of the section of country from the time you first knew it, and afterwards, in respect to Indians?

Answer. The Indians in that neighborhood, at the upper end of the island, were hostile to the whites.

8th. Please state if there was a rancheria of Indians in the neighborhood of this island. If yea, where? also the extent of the Indian population thereabouts, and your means and opportunities of being acquainted therewith.

Answer. At or near the head of this island there was a rancheria of Indians. From the rancheria spoken of, up to the head of the valley, the Indians were very numerous. On the 4th of June, 1843, the party with which I was in company, from Oregon, had a fight with a large body of Indians, say from 500 to 1,000, near the head of and above the island, in which we killed some 18 or thereabouts, and wounded a great many more. The same season Capt. Sutter went up to the same place with a party of men, and he also had a fight with the Indians.

Cross-examined by the U. S. atty. Have you any interest, direct or indirect, in the event of this suit?

Answer. None whatever.

NATHAN COOMBS.

Sworn to before me this 19th day of December, 1855.

JOHN A. MONROE,
U. S. Commissioner.

(Endorsed:) Filed December 19th, 1855. John A. Monroe, clerk, by W. H. Chevers, deputy.

IN THE DISTRICT COURT OF THE UNITED STATES
For the Northern District of California.

UNITED STATES
vs.
JAMES NOE.

On appeal from the U. S. board of land commissioners.

It is consented and agreed between the undersigned, that the testimony of J. B. Alvarado, one of the witnesses heretofore examined in this cause, be further taken before John A. Monroe, esq., a commissioner of said district court, at his office, in the court-house of said court, in the city of San Francisco, on this 20th October, between the hours of 11 a. m. and 3 o'clock p. m. of said day, and that the said testimony, when so taken, shall be reported by said commissioner to the court, and become part of the testimony in said cause.

San Francisco, October 21st, 1856.

WM. BLANDING,
U. S. Dist. Atty.
JAMES RICE, JR.,
Att'y for Claimant, James Noe.

Deposition of J. B. Alvarado.

UNITED STATES DISTRICT COURT,
Northern District of California.

SAN FRANCISCO, *October* 21*st*, 1856.

On this day, before John A. Monroe, a commissioner of the United States for the northern district of California, duly authorized to administer oaths, &c., &c., came Juan B. Alvarado, a witness produced on behalf of the claimant in case No. 270, being an appeal from the board of commissioners to ascertain and settle the private land claims in the State of California, in case No. 294 on the docket of the said board of commissioners, and was duly sworn, and testified as follows:

Present, James Noe, claimant, and James Rice, his att'y, and Wm. Blanding, U. S. district attorney.

Question by claimant.

First. How long were you acquainted with Elwell, the petitioner?

Answer. About twenty years.

Question. Are you acquainted with the services and advances made by the claimant in this case, and referred to in his petition?

Answer. I am. From 1837 to 1838 Mr. Elwell served in a military capacity, under my orders, and I was satisfied he made advances for the military company in Santa Barbara, where he had previously resided. Mr. Elwell never was paid for his military services, and I am satisfied he never took pay for his services, in consideration of which I granted him the land claimed.

I have been informed by the commissary of Santa Barbara that Elwell made advances which the government never paid. I knew Elwell personally, and he was a soldier in Capt. Graham's company, and his services were valuable.

Question. Did you regard the grant to Elwell a good and definitive grant at the time it was made?

Answer. I did so consider it. I regarded it and intended it as a final and definitive grant for valuable services and advances. In making the grant, I regarded it as vacant land. No one else ever applied to me for the land but the petitioner, except Sutter, who asked for some lands in that locality or vicinity. Elwell afterwards discoursed with me concerning the grant, with which I was acquainted. If I had been in power, and Elwell had called on me, I would have given him as full and complete a title as I could. I regarded his claim such a one as would have been recognized and acknowledged fully by the Mexican government, without any further form. I intended to convey a certain island described in the petition.

JUAN B. ALVARADO.

Sworn and subscribed before me this 21st day of October, A. D. 1856.

JOHN A. MONROE,
U. S. Commissioner.

(Endorsed:) Filed October 21st, 1856. John A. Monroe, clerk, by W. H. Chevers, deputy.

Opinion delivered by his Honor Ogden Hoffman, Judge of U. S. Dist. Court.

JAMES NOE
vs.
THE UNITED STATES.

It appears by the title papers produced in this case, that on the 10th May, 1841, Robert Elwell presented a petition to Governor Alvarado, for a tract of land on the Sacramento river. The petitioner sets forth, that for 16 years he had been a resident of the country, and had a numerous family. He also stated that the various political changes in the country had impaired his capital, part of which had been furnished to the different governors, as his excellency was aware.

The petitioner further alludes to his services in the militia, for which he never received any pay, owing to the scarcity of funds in the national exchequer. He therefore begs that his ex'cy, not forgetting the duty of generously recompensing the services of faithful subordinates, and also the necessity of giving an impulse to the progress of agriculture in the country, and supported as he was by the colonization laws, which so fully authorized him to make concessions of land, might grant him the tract solicited.

On the margin of his petition the governor writes: "In consideration of the services and merits herein mentioned, I grant him (the petitioner) the land he requests, with the understanding that he shall abide by the reports that must be asked for, as to whether the land has been granted for the benefit of some private individual, pueblo, or corporation, with all the rest that may be deemed convenient, so soon as he shall accompany the plan, which will head the formation of the expediente."

This petition and marginal decree appear to have remained in the possession of the petitioner; nor were any further steps taken by him to obtain a formal title. He states, however, in his deposition, that a plan was furnished to the governor, such as was deemed sufficient, but the expediente which it was to "head" is not produced from the archives. No efforts of any kind appear to have been made by the petitioner to settle upon or occupy his land, and the title papers seem to have remained in his possession until 1852, when he sold to the present claimant.

In explanation of his failure to occupy the land, the grantee

states that he was prevented from doing so at the time of the grant by the danger from the Indians, and afterwards by the disturbances in the country.

José Castro, a native Californian of some distinction, and who has held the offices of governor, prefect, and commandant general of the Territory, deposes that from 1841 until the change of government, the whole region of country above Sutter's fort or New Helvetia was not in a situation to be settled upon by individual grantees, owing to the hostility of Indians.

The government rarely sent any troops to maintain settlements, and only for short times, and few in number, during the time from 1841 to the change of government.

Nathan Coombs, whose deposition was taken in this court, and who has resided in the country since 1843, testifies that from that year, when he first knew the land, the Indians in the neighborhood were hostile to the whites. That near the head of the island there was a rancheria, and the Indians were very numerous. That a company from Oregon, of which he was a member, had a fight with a large body of them, 500 to 1,000 strong, and that during the same season Capt. Sutter with a party of men also had an engagement with them.

The above comprises all the evidence offered in excuse of explanation of the omission of the grantee to fulfil the conditions of his grant.

The first question that arises under this state of facts is, did the marginal decree of the governor convey to the petitioner "a present and immediate interest, either legal or equitable, in the land?"

The form of the grant is certainly unusual. The marginal decrees of the governors were, in *decrees* ordinary cases, but references for information; and the expedientes usually contain the petition and the diseño, the marginal order of reference, the reports of the officers, and the order or decree of concession by the governor—the latter generally commencing with the words "vista la peticion."

The documents or final title was then made out, in conformity with the order of concession. In this were expressed the conditions of the grant, its extent, &c., and it was delivered to the party interested as his title deed. A copy, however, was usually attached to the other documents enumerated forming the expediente, on file in the archives, but the copy was frequently not signed—it being thought sufficient if the title paper delivered to the party was properly authenticated. The title papers were usually signed by the governor and secretary.

The expediente, when thus completed, was transmitted to the assembly for their action, and, if the grant was approved, a certificate of the fact was given to the grantee.

I have met with no case where these forms were not substantially complied with when grants under the colonization laws were made. In this case, the only document relied on as a grant is the order or

decree written on the margin of the petition. Undoubtedly the governor uses words of grant: "I grant him the land which he requests;" but the condition or qualification annexed, that the petitioner should abide by the reports, &c., clearly shows that the governor did not intend his marginal decree to operate as a definitive concession of the land.

In the case of Acquello vs. the U. S., decided at the last term of the Supreme Court, the court, in speaking of the order of concession in that case, (which was the decree already alluded to, beginning with the words "vista la peticion," and which was certainly a more formal decree than the marginal order in the present case,) say: "By the 4th s. the governor, being thus informed, may accede or not to the petition. This was done in two ways: sometimes he expressed his consent by merely writing the word 'concide' at the bottom of the expediente, at other times with more formality. * * It is intended merely to show that the governor has acceded to the request of the applicant, and as an order for the patent or definitive title to be drawn out for execution. * * It has none of the characteristics of a definitive grant."

But the marginal decree in this case cannot even be regarded as an order for the definitive grant to be made out, for the governor clearly intimates that reports are to be received, the diseño to be furnished, and the expediente to be formed, before the final title issued. The marginal order, must, I think, be taken merely as showing that the governor has acceded to the petitioner's request, and agrees to grant him the land if the reports, &c., should be favorable.

But it is to be observed that the information required by the governor was only as to whether the land was the property of any one else; and the absolute terms of the order itself, as well as the language of the qualification added to it, perhaps justify us in considering it as positive promise to grant the land to the petitioner, in consideration of his just claims upon the government, provided it should turn out that the land was vacant.

The right thus acquired by the petitioner was an equitable claim upon the government to have his title perfected; and had he gone on to occupy and improve his land, and had he been found, at the acquisition of the country, in the possession and enjoyment of it, the U. S. would have been clearly bound to respect his rights.

But, so far as the evidence discloses, the petitioner never went upon his land during the existence of the former government. The causes of his omission to do so, as shown by the evidence, were the usual ones of Indian hostilities and political disturbances. No testimony has been taken to show that the obstacles to a settlement might have been overcome. Nor has it been made to appear to the court, on behalf of the U. S., that any one denounced the land. Compelled, as we are, to be governed by the evidence in each par-

ticular, we must accept facts as true which are established by the uncontradicted testimony of unimpeached witnesses.

It would seem clear, then, from the testimony, that from the time of the grant until the American occupation the settlement of the land was impracticable. The omission to occupy cannot, therefore, raise any presumption of a voluntary abandonment by the grantee. That such a delay would probably not have forfeited the land, under the Mexican laws and usages, unless some other person was ready to appropriate the lands, and thus carry out the policy of the government, was intimated by the Supreme Court in the case of Fremont. More especially would the grantee be entitled to indulgence where the grant was not made "merely to carry out the colonization laws, but in consideration of previous public services."

The circumstance which suggests most strongly the idea that the grantee did in truth abandon all thought of profiting by his grant, is his omission to take further application for the usual and formal title. I have endeavored correctly to estimate the force which should be given to this consideration. It has seemed to me that it would, perhaps, be going too far to infer such an intention from the grantee's omission in this particular.

As to his acts and declarations from the time of the grant until the conveyance to the present claimant, we are wholly uninformed whether he continued to assert his rights to the land; whether those rights were recognized by the government we are ignorant, and in the absence of proofs we are perhaps justified in supposing that he considered his right to the land sufficiently secured by the title he had received, particularly as the causes which prevented a settlement by him would also deter others from applying for the land.

But, admitting that the explanation of the grantee's delay in this case is sufficient, within the rule laid down in Fremont's case, to repel the idea of a voluntary abandonment and consequent forfeiture, it is to be remembered that the grant in this case was not, like that to Alvarado, a definitive or final title with conditions subsequent annexed. It was but an inchoate or imperfect grant, and, as has been shown, cannot be regarded as a passing grant under the colonization laws, the final title to the land.

The inquiry in this case would, therefore, seem to be not, as in Fremont's case, whether the omission to perform conditions subsequent had forfeited an estate vested in the grantee by a formal and definitive grant, but whether he is in equity entitled to a completion and perfection of the inchoate title or equitable right he received from the former government. Under the Mexican colonization laws, the strongest claim he could urge would be the fact that he had, by settling upon and improving the land, given the only consideration for the grant their laws or policy required.

But in this case he can found his claim upon no such consideration; and though he may not be deemed to have voluntarily abandoned his grant, yet he can allege nothing done by him subsequent

to it or on the faith of it which strengthens his equitable claim either upon this or the former government. If, then, this grant had been solely on consideration of future settlement and occupation, it seems to me that it should be rejected.

But it appears that the petitioner had other claims, not merely on the bounty but on the justice of the Mexican government.

In his petition he appeals to the governor's knowledge of the fact that he had impaired his capital by furnishing money to different governors, and that he had faithfully served in the militia, without receiving pay, owing to the scarcity of funds in the national exchequer. He asks for the grant as a recompense for his services, as well as because it would be in accordance with the policy of the colonization laws.

The governor, in acceding to the petition, expressly says that he does so in consideration of the services and merits herein mentioned; and by the testimony of Alvarado himself, taken in this court, it appears that the petitioner was actually a creditor of the government for advances made by him, as well as entitled to its consideration for his patriotic services.

In the case of Fremont, the Supreme Court say: "Although this cannot be regarded as a money consideration, making the transaction a purchase from the government, yet it is the acknowledgment of a just and equitable claim; and when the grant was made on that consideration, the title in a court of equity ought to be as firm and valid as if it had been purchased with money on the same conditions."

But in that case the consideration alluded to was the "patriotic services" of the petitioner, and they are only referred to in the grant as entitling his application to a preference on other applications or favorable consideration.

But in the case at bar, the petitioner had not only faithfully served the country, but appears to have been a creditor for advances made by him and pay due to him as a soldier.

The observations of the Supreme Court apply, therefore, with great force to the present case. If, then, the petitioner cannot be deemed to have voluntarily abandoned his grant, it has seemed to me that the equitable right he acquired, on the considerations mentioned, ought to be respected, although he has failed to furnish the other consideration of settlement and occupation upon which, in general, Mexican grants were made.

It can hardly be doubted that, as testified by Alvarado, the former government would have felt itself bound to perfect a title promised to him by the governor under such circumstances, and that the grant of the latter of the land, provided it was vacant, would, had the petitioner subsequently applied for the formal title, have been treated as giving him a right to have it issued. That equitable obligation is as binding on the conscience of this as of the former

government, and it has, after much consideration, appeared to me that the claim should be confirmed.

The counsel for the claimant has unjustly pressed upon the court that the grant in this case was not made under the colonization laws of 1824 and the regulations of 1828, but under the law of April 4, 1837. (1 Rockwell, p. 627.) But this view cannot be supported. That law, even if it were ever carried into effect in California, merely authorizes "the government, with the consent of the council," to give effect to the colonization of the lands of the republic, by means of sale or mortgage, "applying the amount to the redemption of the national debt," &c.

This evidently confers the authority on the supreme government, and we accordingly find that a decree was made by the supreme government, in virtue of the authority conferred by the law of the 4th inst., by which a national consolidated stock was created, and 100,000,000 acres of land in various departments pledged to secure it. In case *of* the land so pledged should be sold, it was provided that the sale should be at the rate at least of 4 acres to the pound, and the purchase-money was to be paid by the purchaser to government agents in London, to be used by them for the redemption of the stock.

It is evident that the grant in the case at bar was not a purchase under this law. The petition itself repels such an idea, for the petitioner refers to the colonization laws, and their intention and policy, as giving authority and furnishing a proper inducement to the grant.

It is clear that this grant was a concession under the colonization laws, not a sale under the law of 1837.

The land is described in the petition as situated in the "waste part of the Sacramento frontier, about 18 leagues from the establishment of Don Aug. Sutter. This land is bounded by the Sacramento river like an island, and is indicated by a hill on the bank of the river, which there divides itself into two arms, east and west, and contains five square leagues, more or less, agreeably to the plan which I shall present as soon as circumstances shall permit me so to do."

The governor granted the petitioner the land he requested; the diseño has not been produced, although the grantee testifies that it was furnished.

It nowhere appears from the evidence what quantity of land is embraced within the limits of the island mentioned by the petitioner.

The grant could not, however, by law have been for a greater quantity than 11 leagues. The tract is described in the petition as bounded by the Sacramento river like an island; and the governor, in his marginal decree, grants "the land solicited." The subject of the grant would therefore seem to be the island mentioned; and we think the claim should be confined to the land within its limits,

provided that they do not embrace more than the quantity of 11 leagues.

It is stated by counsel that the quantity of land included in the island is somewhat more than six leagues. The petitioner represents it as five leagues, more or less. This is, perhaps, as close an approximation to the real quantity as often occurred under the loose and inaccurate ideas of the extent of land formed by the former inhabitants of this country. And as the governor, we think, intended to give the island, and as no deception seems to have been practised upon him, the claim should be sustained for the whole land which the petitioner intended to solicit and the governor to grant.

Decree.

At a stated term of the district court of the United States in and for the northern district of California, continued and held in and for said district, at the court room of the said court, in the city of San Francisco, on Saturday, the fifteenth day of November, in the year of our Lord one thousand eight hundred and fifty-six:

Present, the honorable M. H. McAllister, circuit judge; the honorable Ogden Hoffman, district judge—

JAMES NOE, appellant,
versus
THE UNITED STATES, appellees. } Decree No. 270.

No 270. On appeal from the final decision of the board of commissioners to ascertain and settle private land claims in the State of California.

This cause came on to be heard at a stated term of the court, on appeal from the final decision of the board of commissioners to ascertain and settle private land claims in the State of California, under an act of Congress approved on the 3d day of March, A. D. 1851, upon the transcript of the proceedings and decision of the said commissioners, and of the papers and evidence upon which the said decision was founded, and on additional testimony taken before this court; and it appearing to the satisfaction of the court that the said transcript has been duly filed according to law, and counsel for the respective parties having been heard, it is the opinion of the court that the said decision is erroneous. And it is by the court hereby ordered, adjudged, and decreed that the said decision be, and the same is hereby, in all things reversed, set aside, and annulled. And it is further by the court hereby ordered, adjudged, and decreed, that the claim of the appellant is a good and valid claim, and that the said claim be, and the same is hereby, confirmed unto the said appellant, James Noe, to the extent of the island mentioned and described in the petition and other papers in this

cause. The island of which confirmation is hereby made, is the same which was granted to one Robert Elwell on the 15th day of March, A. D. 1841, by Juan B. Alvarado, governor of the Californias, is situated in the waste parts of the northern frontier of Sacramento, about eighteen leagues above the establishment of Don Aug. Sutter, and is made an island by the Sacramento river divided into two arms, east and west, indicated by a hill on the bank of the river, and containing, by estimation, five square leagues of land, a little more or less, according to the terms of the grant, reference to which and to the other papers on file in this cause is hereby made: Provided, that the said island does not contain more than eleven square leagues of land, in which case confirmation is hereby made of so much of the said island as may be contained within the said quantity of eleven square leagues, and no more: Provided, that the said quantity of eleven square leagues of land so confirmed, in case the said island shall contain as much or more than the quantity of eleven square leagues of land, be contained within the said island; but if there be less than the said quantity of eleven square leagues of land contained within the said island, then the said claim is confirmed to the extent of such less quantity, and no more.

OGDEN HOFFMAN,
U. S. District Judge.
M. H. McALLISTER,
Circuit Judge.

(Endorsed:) Filed November 15th, 1856. John A. Monroe, clerk, by W. H. Chevers, deputy.

Opinion on Motion to grant Appeal, by Honorable Judge Hoffman.

THE UNITED STATES
vs.
JAMES NOE.

An appeal is moved in this case by the district attorney. The motion is opposed, on the ground that the court has no power to grant an appeal after the expiration of the term at which the decree has been rendered.

The question raised is important, for it is understood that there are several cases in which decrees were rendered during the last term, and in which no appeal was taken during that term.

By the act of 1851, no period is expressly mentioned within which the appeal must be taken.

The language of the 10 section is, the district court shall proceed to render judgment, &c., "and shall, on the application of the party against whom judgment is rendered, grant an appeal to the Supreme Court."

It is contended that the word "appeal" imports, ex vi termini,

a proceeding taken sedente cuvia, or during the session of the court at which the decree appealed from is rendered.

It was early decided by the Supreme Court that the term "appeal," in the judicial act of 1789, must be understood in its technical sense, expressive of the civil law mode of removing a cause to a higher tribunal, and not in its popular sense, as descriptive of appellate jurisdiction, without regard to the manner in which the cause is transmitted to that jurisdiction. 7 Cranch, 108, 387; 2 Wheat., 248.

The term "appeal" is undoubtedly used in the same sense in the act of 1851, and denotes the civil law mode of transferring a cause to a superior tribunal, for a retrial of the matters fact as well as of law, as distinguished from a writ of error, by which errors in matters of law were alone submitted for revision.

The question, then, arises, whether an "appeal," according to the import of the term in the civil law, as it used the proceedings of courts in England and the United States, whose practice is based upon the rules of the civil law, or as used in the acts of Congress, necessarily denotes a proceeding to be taken in open court, and during the term at which the decree appealed from is rendered.

By the Roman law, up to the time of Justinian, appeals viva voce were allowable on the day the sentence was pronounced. Cod de Appel, 7, 62, 14; Dig., 49, 1, 2. A little more time was given for an appeal in writing.

According to Ulpi An. Dig., 49, 1, section 11—two days to one acting in his own cause; three days to one acting in a representative capacity, such as tutor, curator, &c.

But various impediments or excuses were received to mitigate the rigor of this proscription.

Justinian, in his 23d Novel, cap. 1, after alluding to the evils of this short and double period, enacts that in all cases a delay of ten days should be given, to be computed from the reading of the sentence.

Such appears to have been the law of Spain, though the time was subsequently restricted to five days. Nov Recoss, lib. 11, lib. 20, law 1.

By the practice of the ecclesiastical and admiralty courts in England, appeals from a definitive sentence may be either apud acta, at the time of the sentence, viva voce, in presence of the judge, or in scriptis, reduced to writing within 10 (or, in the ecclesiastical courts, 15) days before a notary.

The appeals from the High Court of Chancery to the House of Lords, the first step is a notice of appeal, the next a petition of appeal, which is presented to the Lords, and on which a summons issues to the respondent. These petitions of appeal are, by statute, limited to five years.

By the acts of Congress, appeals are made subject to the same rules, regulations, and restrictions as are prescribed by law in cases

of writs of error. These rules were decided by the Supreme Court, in the case of "The Law Pedio," (2 Wheat., 132,) to be those contained in the 22d and 23d sections of the act of 1789, and they relate to the time within which a writ of error may be brought, and when it shall operate as a supersedeas, the citation to the adverse party, the security, &c.

All these regulations are, in the opinion of the Supreme Court, applicable to appeals under the act of 1803, and are to be substantially observed.

In analogy, then, to the practice in cases of writs of error, a copy of the appeal is served upon the adverse party by lodging it in the clerk's office, and a citation is served upon him, as required by the 22d and 23d sections of the act of 1789.

The Supreme Court have recognized, however, the practice of taking an appeal in open court, or entering it during the session of the court at which the decree appealed from is pronounced. In such case, the personal citation is held not to be indispensable, (Riley v. Sawar, 2 Cranch, 344,) and perhaps the service of the notice of appeal would be held to be unnecessary for the same reason.

It thus appears that, although originally appeals may have been taken in open court, yet, by the practice of all the courts proceeding according to the forms of the civil law, the appeal may be taken out of court in different modes prescribed by law or by the rules of court; that the time within they are to be taken in like manner expressly limited; but it in no case refers to the terms of the court pronouncing the decree.

The distinction between term time and vacation being, so far as I am informed, wholly unknown to the civil law, altho' the mode of appealing "in scriptis," or before a notary, is not admissible in our practice, yet another mode of effecting the same object, by a proceeding out of court, is authorized by statute, and we have, then, that in the ecclesiastical and admiralty courts of England; that manner of taking appeals is still allowed. There would seem, therefore, no ground for the idea that an appeal means, ex vi termini, a proceeding in open court, to be taken of necessity during the term at which the decree is pronounced. Two decisions of Judge Story have been cited by the counsel for the claimants in support of their position: Norton v. Rich, 3d Mason, 442, and the St'boat New England, 3 Sum., 495.

It appears to me that those cases corroborate the views above expressed.

The judiciary act of 1789 directed that appeals from the district court should be taken to the "next circuit court." It provided no mode of taking the appeals. The case was thus far supposed by Judge Story to be untouched by statute. Whether the provisions of the act of 1803 do not apply to appeals from the district to the circuit court, as well as to those from the latter to the Supreme

Court, may admit of doubt. The provisions of the act of 1803 do not seem to have been brought to the notice of Judge Story. But assuming that the law makes no provision whatever on the subject, except to allow the naked right of appeal to the next circuit court, the case presented to Judge Story does not materially differ from that submitted to this court. If, therefore, the word appeal necessarily imported a proceeding sedente cuvia and viva voce, he would have determined that no appeal could be taken in any other manner.

But such is not his decision. On the contrary, he states that the district courts may require the appeals to be taken either sedente cuvia, and before an adjournment sine die, or afterwards, within a fixed time, in the clerk's office.

As in the Massachusetts district, no rules as to appeals had been established, but the uniform course from the earliest period had been to take appeals in open court before the adjournment. This practice was considered equivalent to a rule, and obligatory upon all parties.

The case of the Steamboat New England, so far as it relates to the point under discretion, affirms the decision of Rich and Norton, and avowedly proceeds on its authority.

It is evident that in these cases appeals were required to be taken sedente cuvia, and before adjournment, solely because the rules of court, or a long continued and uniform practice equivalent to a rule, had so provided, and not because the right of appeal conferred by statute imported such a proceeding and none other.

Had such been Judge Story's construction of the term, he would not have admitted the power of the court to enlarge or abridge the right.

The 152d rule of the district court for the southern district of New York affirms the same principle.

That rule provides that appeals may be entered within ten days from the time of rendering the decree. "A brief notice in writing to the clerk and opposite proctor that the party appeals in the cause, shall be a sufficient entry of the appeal, without any petition to the court for leave to enter the same."

Under this rule, appeals are entered in the clerk's office within the time limited, but wholly without regard to the adjournment of the court. And the practice of taking an appeal in open court, at any time before its adjournment, has fallen into disuse, if, indeed, it be any longer admissible.

I think it clear that the term "appeal," according to the practice of all courts proceeding according to the forms of the civil law, has no such meaning as that attributed to it in the argument.

But even if this were doubtful, the question would still arise, whether Congress intended to use it in the act of 1851 in any such limited and doubtful sense.

Had the intention of Congress been to prescribe a period shorter than that allowed by the general laws regulating appeals, some lim-

itation would probably have been fixed, as in the acts of 1824 and 1828, by the first of which 12 mos. and by the second 4 months were allowed.

They would hardly have left the limitation to be inferred from the use of the word "appeal," in a sense different from that in which it is elsewhere used in legislation, and when the period thus allowed would vary from 6 months to a few moments, depending upon whether the decree was rendered at the beginning or the end of the term.

It seems far more probable that Congress used the term as it is known in the acts of Congress, and as importing a proceeding to be taken within five years from the date of the decree. Such a limitation would no doubt be applied should the case arise; and very possibly the court, in the absence of express regulations on the subject, would be authorized to fix by its rules a reasonable period within which the appeal is to be taken, as has been done by the district courts sitting in admiralty in cases of appeal to the circuit court, which are, in like manner, unprovided for by statute.

No such rules have, however, been established by this court, the practice having been to grant the appeal whenever moved for.

The objection we have considered has only recently been raised, and, if suffered to prevail, would operate as a surprise upon the United States, as well as upon claimants, who, in ignorance of any such implied limitation on the rights of appeal, have omitted to move for it before the expiration of the term at which the decree was rendered.

For the reasons above stated, we think the objection cannot be sustained.

It may be observed, in conclusion, that the question presented is, in its own nature, more fit for the consideration of the superior tribunal to which an appeal is sought, than for that of the inferior court from which an appeal is taken. A preliminary motion to dismiss the appeal, as irregularly taken, may be made before the Supreme Court, and the question finally determined; whereas a refusal by this court to allow the appeal would involve the delay of a mandamus to this court, until the return of which the decision of the point would necessarily be deferred.

(Endorsed:) Filed November 4th, 1857. John A. Monroe, clerk.

Order granting Appeal.

At a stated term of the district court of the United States of America for the northern district of California, held at the court-room in the city of San Francisco, on Wednesday, the fourth day of November, in the year of our Lord one thousand eight hundred and fifty-seven:

Present, the honorable Ogden Hoffman, district judge; present—

THE UNITED STATES
vs.
JAMES NOE. } D. C. 270. L. C. 294.

In this case, on application of P. Della Torre, esq., U. S. attorney, made in open court, it is ordered by the court that an appeal, in behalf of the United States, from the final decision of this court rendered in said cause at the June, 1856, term, be and the same is hereby granted, and that a certified transcript of the pleadings, evidence, depositions, and proceedings in the said cause be sent to the Supreme Court of the United States without delay; and the appellant is ordered to serve the usual citation according to law.

OGDEN HOFFMAN,
U. S. Dist. Judge.

(Endorsed:) Filed November 4th, 1857. John A. Monroe, clerk.

Motion and order of a Cross-Appeal.

UNITED STATES DISTRICT COURT,
Northern District of California.

JAMES NOE, appellant,
vs.
THE UNITED STATES, appellees.

And now at this day comes the appellant in the above-entitled cause, by Calhoun Benham, his attorney, and reserving the exception heretofore taken to the order of the court, granting an appeal in said cause after the expiration of the term of the said court at which the decree of confirmation was rendered, moves the court that a cross-appeal be granted to the said appellant in said cause.

Whereupon it is ordered by the court—the district attorney of the United States for the northern district of California being present—that the cross-appeal applied for in said cause be and the same is accordingly granted to the Supreme Court of the United States.

OGDEN HOFFMAN,
U. S. Dist. Judge.

(Endorsed:) Filed November 10th, 1857. John A. Monroe, clerk.

Clerk's Certificate.

I, John A. Monroe, clerk of the district court of the United States for the northern district of California, do hereby certify that the annexed pages from one to forty-seven, inclusive, contain a full, true, and correct transcript of the record on file from the board of land commissioners, together with the pleadings, depositions, orders, opinions, and decree filed in this office in the case entitled James Noe, appellant, vs. The United States, appellees.

In testimony whereof, I have hereunto set my hand and affixed the seal of this court, the seventeenth day of November, [SEAL.] A. D. 1857, and of the independence of the United States of America the 82d.

JOHN A. MONROE, *Clerk*.